vss

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1296 OF 2005

Haresh Jamnadas Parekh & Anr. ... Petitioners

V/s.

Board of Trustees of Mota Mandir Trust through Shri R.M. Bhattad & Ors. ... Respondents

Mr.S.M. Gorwadkar i/b B.H. Mehta for Petitioners
Mr.Kamal Kata i/b Y.N. Adhia for Respondents

CORAM: **SMT.NISHITA MHATRE, J.**

DATED: **AUGUST 24, 2005**

P.C.:

. This Petition challenges the order of the trial Court allowing the application filed by the plaintiffs, respondents herein, to add the petitioners as defendants in place of their deceased father. According to the Petitioners, the original defendant Shri Jamnadas Manubhai Attarwala expired on 25.4.2003. An interim notice was taken out by the Petitioners on 3.7.2003 in the suit filed by them in R.A.D. Suit No.353 of 1994 to bring themselves on record as legal representatives of their deceased father. However, the respondents took out a notice on 1.11.2003 in RAE Suit No.1116 of 2000 for joining the petitioners as party defendants in the said suit.

2. The original defendant had expired on 25.4.2003. The grievance of the Petitioner is that there was no prayer in the Respondents' notice for setting aside the abatement which had already occurred. Nor was there a prayer for condoning the delay in filing the application for setting aside the abatement and bringing on record legal heirs of the original defendant. Reliance is placed on the judgment in the case of *Union of India v/s. Ram Charan*, **AIR 1964 SC 215** to submit that the limitation begins to run on the death of the party to the proceeding and unless there are prayers for setting aside the abatement and for condoning the delay, no order allowing the legal heirs of the deceased to be brought on record can be passed.

3. I have perused the application filed by the respondents for bringing on record the legal heirs of the original defendant. It is true that the prayer clause does not contain any prayer for setting aside the abatement or for condoning the delay in filing the application on 1.11.2003. However, in para 5 of the application, it is stated that the plaintiffs i.e., the respondents herein, came to know of the notice dated 3.7.2003, which was served by the Petitioners on the advocate for the plaintiffs, only on 20.8.2003. It is,

therefore, stated that the abatement of the suit should be set aside and that the delay in filing the application condoned.

4. However, the respondents relied on the judgment of the Supreme Court in the case of *Mithailal Dalsangar Singh & Ors. v/s. Annabai Devram Kini & Ors.,* **(2003) 10 SCC 691.** The Apex Court was considering whether an application filed to set aside the abatement should be in a particular format. The Apex Court has observed thus:

> 8. Inasmuch as the abatement results in denial of hearing on the merits of the case, the provision of abatement has to be construed strictly. On the other hand, the prayer for setting aside an abatement and the dismissal consequent upon an abatement, have to be considered liberally. A simple prayer for bringing the legal representatives on record without specifically praying for setting aside of an abatement may in substance be construed as a prayer for setting aside the abatement. So also a prayer for setting aside abatement as regards one of the plaintiffs can be construed as a prayer for setting aside the abatement of the suit in its entirety. Abatement of suit for failure to move an application for bringing the legal representatives on record within the prescribed period of limitation is automatic and a specific order dismissing the suit as abated is not called for. Once the suit has abated as a matter of law, though there may not have been passed on record a specific order dismissing the suit as abated, yet the legal representatives proposing to be brought on record or any other applicant proposing to bring the legal representatives of the deceased party on record would seek the setting aside of an abatement. A prayer for bringing the legal representatives on

> record, if allowed, would have effect of setting aside the abatement as the relief of setting aside abatement though not asked for in so many words is in effect being actually asked for and is necessarily implied. Too technical or pedantic an approach in such cases is not called for. (Emphasis supplied).
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> 9. The courts have to adopt a justice-oriented approach dictated by the uppermost consideration that ordinarily a litigant ought not to be denied an opportunity of having a lis determined on merits unless he has, by gross negligence, deliberate inaction or something akin to misconduct, disentitled himself from seeking the indulgence of the court. The opinion of the trial Judge allowing a prayer for setting aside abatement and his finding on the question of availability of "sufficient cause" within the meaning of sub-rule (2) of Rule 9 of Order 22 and of Section 5 of the Limitation Act, 1963 deserves to be given weight, and once arrived at would not normally be interferred with by superior jurisdiction.

5. Both the trial Court and the appellate Court have found that sufficient cause has been made out by the plaintiffs and have rightly allowed the interim notice taken out by the plaintiffs. Both the Courts have directed that the abatement is set aside and the delay is condoned while allowing the plaintiffs to add the Petitioners as party defendants in the suit. In my view, there is no need to interfere with the findings of the Courts below. Petition rejected.